

October 12, 2005

Thomas V. Speer
[Address Redacted]
Woodland, CA 95695

**Re: Your Request for Informal Assistance
Our File No. I-05-128**

Dear Mr. Speer:

This letter is in response to your request for advice regarding the post-governmental employment provisions of the Political Reform Act (the “Act”).¹ As your request seeks general guidance relating to the post-governmental employment provisions of the Act, and does not provide specific information about particular proceedings, we are treating your request as one for informal assistance.² This letter is solely based on the facts presented to us in your request. The Commission does not act as a finder of fact when issuing advice or informal assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and all of the material facts have been provided.

QUESTIONS

1. When, and in what capacity, may you accept assignments from your new employer to provide consulting services to the Department of Water Resources (the “DWR”)?
2. Are you limited or restricted in the consulting services that you may provide to other state departments, local governments, or special districts?

¹ The Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329, subd. (c), enclosed.)

CONCLUSIONS

1 and 2. You may accept assignments from your new employer to provide consulting services to the DWR provided, for a period of one year after the date that you left your employment with the DWR, you do not, for compensation, engage in any communications with the DWR staff on behalf of another person, including your new employer, for the purpose of influencing any of the DWR's legislative or administrative actions, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

The ban would apply to your consulting services on behalf of state departments, local governments, and special districts unless an exception applies. For example, if you are acting as an officer or employee of another state department, the ban would not apply. In addition, you are permanently prohibited from participating in any proceeding in which the State of California is a party or has a direct and substantial interest, including a contract proceeding, on behalf of anyone including your employer but not including another state department, and permanently prohibited from aiding anyone including your employer but not including another state department, in connection with any proceeding in which the State of California is a party or has a direct and substantial interest, including a contract proceeding, if you personally and substantially participated in that same proceeding while employed by the DWR.

FACTS

You retired from the California Department of Water Resources (the "DWR") on May 31, 2005, where you were last employed as chief of the departmental services office, a CEA II position that you assumed in September 2000. This was a designated position in the DWR's conflict of interest code. You are now working for an accounting/consulting firm. Your work with the consulting firm includes providing risk advisory services, information technology consulting services, and management advice and project management services concerning various information technology projects for state and local government customers.

As chief of the departmental services office, you were at times responsible for up to about 150 staff performing administrative functions within the DWR involving a variety of subject areas, such as contacts, purchasing, facilities management, mobile equipment, central records, and printing production. Your role concerning contracts and purchasing was not one of deciding which vendors to use, but more that of managing the supervisors of the offices that functioned in these areas and assuring that the DWR complied with state rules and regulations concerning contracts and purchasing. You did not get involved in potential contracts unless problems arose, or it was necessary to meet with one of the control agencies.

Prior to serving in your last position with the DWR, you served as the agency's chief information officer for 13 years. In that position, you oversaw the day-to-day information technology operation, which included making recommendations and granting approval for information technology contracts and purchases, and advising the DWR management staff.

ANALYSIS

Public officials who leave state service are subject to two types of post-governmental employment restrictions under the Act. The first is a one-year ban on making any appearance before the official's former agency for compensation for the purpose of influencing administrative, legislative, or other specified actions. The second is a permanent ban on advising or representing any person for compensation in any judicial or other proceeding in which the official participated while in state service.

One Year Ban

The one-year ban applicable to former state employees is set forth in section 87406, subdivision (d). Section 87406, subdivision (d)(1) specifically provides that no designated employee of a state administrative agency:

“ . . . for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property”³

Under the one-year ban, a former state employee may not appear before or communicate with his or her former agency, if the communication or appearance is made for the purpose of influencing any legislative or administrative action, or influencing any discretionary act “involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (§ 87406, subd. (d)(1); Reg. 18746.1, subd. (b)(5).) For the purposes of the one-year ban, the employee's former agency includes any state administrative agency that the employee formerly worked for or represented during the 12-month period before he or she left state service, and also includes any agency, commission, department, or division whose budget, personnel, and other operations are controlled by the former agency. (Reg. 18746.1, subd. (b)(6).) An appearance before or communication with the former agency “is for the purpose of influencing if it is made for the principal purpose of

³ “Administrative action” is defined as “the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding” (§ 82002, subd. (a).)

supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Reg. 18746.2, subd. (a).)⁴

However, not all communications with a former state administrative agency employer are prohibited by the one-year ban. The ban extends only to those communications for the purpose of influencing any legislative or administrative action, or influencing any discretionary act “involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.” (§ 87406(d)(1); Reg. 18746.1, subd. (b)(5).) An appearance or communication before a former state administrative agency employer, made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Reg. 18746.1, subd. (b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.) Moreover, the ban does not apply to an appearance or communication before a former state administrative agency employer if it is made as an officer or employee of another state agency, board, or commission. (§ 87406, subd. (e)(1); *Lewis* Advice Letter, A-03-209; *Mazzoni* Advice Letter, A-03-066; *Boom* Advice Letter, A-03-157.)

The one-year period commences once a state employee is no longer being compensated and is no longer under an employment agreement with his or her agency. (*Weil* Advice Letter, No. A-97-247.)

Permanent Ban on Switching Sides

Separate from the one-year ban, the permanent ban on switching sides may restrict activities that are permitted under the provisions of the one-year ban. Sections 87401 and 87402 set forth the permanent ban that prohibits former state administrative officials,⁵ who participated in a judicial, quasi-judicial, or other proceeding while employed by a state agency, from being paid to represent or assist in representing another person regarding that same proceeding. Section 87401 specifically provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by

⁴ The Commission has advised that a former agency official may draft communications or proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321.)

⁵ “State administrative official” is defined in section 87400, subdivision (b) as “every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.”

making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.”

Section 87402 provides:

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.”

Regulation 18741.1 further clarifies that:

“(a) The prohibitions of Government Code Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

(1) The official has permanently left state service or is on a leave of absence.

(2) The official is compensated, or promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services are not prohibited or limited by this section.

(3) The official makes an appearance or communication before any officer or employee of any state administrative agency for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in 2 Cal. Code Regs. Section 18202, subdivisions (a)(1)-(a)(7).

(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in 2 Cal. Code Regs. Sections 18702.1-18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. Any supervisor is deemed to have participated in any proceeding which was “pending before,” as defined in 2 Cal.

Code Regs. Section 18438.2, subdivision (b), the official's agency and which was under his or her supervisory authority.

(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated.”

As stated above, the permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which a person participated while a state administrative official. “‘Judicial, quasi-judicial or other proceeding’ means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency” (§ 87400, subd. (c).) It includes any proceeding in which a state administrative official has participated, but is not concluded before the official leaves state employment.

An official is considered to have “participated” in a proceeding if the official was personally and substantially involved in the proceeding “through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee.” (§ 87400, subd. (d).) In the case of a former state official who held a management position in a state administrative agency, that person is deemed to have participated in a proceeding if: (1) the proceeding was pending before the agency during his or her tenure; and (2) the proceeding was under his or her supervisory authority. (Reg. 18741.1, subd. (a)(4).)

However, it is important to note that the permanent ban only prohibits a former state administrative official from participating in the “same” proceeding in which he or she participated as a state employee, and not any “new” proceedings, including new contracts in which the former employee did not participate. (§ 87401; *Grady* Advice Letter, No. I-99-034.) Determining whether a proceeding is new or the same as one in which the official previously participated while in state service often requires a rather fact-specific inquiry. Generally, a new contract is one that is based on new consideration and new terms, even if involving the same parties. (*Ferber* Advice Letter, No. I-99-104; *Anderson* Advice Letter, No. A-98-159.) In addition, the Commission considers the application, drafting, and awarding of a contract, license, or approval to be a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Blonien* Advice Letter, No. A-89-463.)

Consulting Services To the DWR

If your new employer has an existing contract with the DWR, or without your participation, negotiates a new contract with the DWR,⁶ you are permitted to accept an assignment to administer, implement, or fulfill the requirements of such a contract, without

⁶ Once a new contract is brought into existence, it becomes an “existing contract,” for the purposes of regulation 18746.1, subdivision (b)(5)(A), that a former state administrative agency official may perform without violating the one-year ban so long as such performance does not constitute a new action or proceeding. (*Hamilton* Advice Letter, No. I-99-159.)

running afoul of the one-year ban, provided that you do not engage in any communications with the DWR on behalf of another person, for the purpose of influencing the legislative or administrative actions of the DWR, including the issuance, amendment, awarding, or revocation of a contract. The one-year ban that prohibits you from communicating with the DWR for the purpose of influencing the agency's legislative or administrative actions runs for one year from the date that your status as a DWR employee ends and you are no longer receiving any compensation from the DWR.

In addition to this one year ban, the permanent ban against switching sides permanently prohibits you from participating in any proceeding on behalf of your employer, including any contract proceeding, if you personally and substantially participated in that same proceeding while employed by the DWR. An example of this would be helping your employer to bid on a consulting contract after having participated in the process for putting that same contract out for bid while you were employed by the DWR. As a manager at the DWR, you are deemed to have personally and substantially participated in a proceeding if it was pending during your tenure at the DWR, and action on it was under your supervisory authority.⁷

Consulting Services To Other State Departments, Local Governments, Or Special Districts

The one-year ban would generally not affect your ability to provide consulting services to government agencies other than the DWR, unless, as part of the services you are assigned to provide, you are called upon to communicate with the DWR. In that case, you would again be prohibited from communicating with the DWR for the purpose of influencing the agency's legislative or administrative actions, if you are acting on behalf of a local government or a special district, or acting on behalf of another state department, but not as an official or employee of that department. If you are acting as an officer or employee of another state department, the ban would not apply.

As the permanent ban does not apply to a former state official acting on behalf of another state agency, it would not restrict you from providing consulting services to any state agency, even concerning those matters that you participated in while an employee of the DWR. (*Hancock* Advice Letter, No. A-05-007; *Webb* Advice Letter, A-93-382.) However, the permanent ban would prohibit you from participating as a consultant for any non-state governmental entity in any proceeding in which you personally and substantially participated as an employee of the DWR. (*Smoot* Advice Letter, A-98-061.) This would include any proceeding that was pending during your tenure at the DWR, and action on it was under your supervisory authority.

⁷ A former state administrative agency official is deemed to have personally and substantially participated in all proceedings of his or her former agency that were conducted under his or her supervisory authority. (Reg. 18741.1, subd. (a)(4).) However, in an opinion, the Commission concluded that an official's general administrative oversight of a program carried out by those subordinate to the official on an agency's organizational chart is insufficient to rise to the level of the "personal and substantial" involvement. (In *In re Lucas* (2000) 14 FPPC Ops. 15.)

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By:

Steven Benito Russo
Senior Commission Counsel
Legal Division

Enclosure

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